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No. 90-1535

IN THE
Supreme Court of the United States
October Term, 1990

THE CONE CORPORATION, *et al.*,
Petitioners,

v.

FLORIDA DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents restate the first question presented as follows:

1. Did the Court of Appeals err in holding that petitioners failed to prove standing by having failed to demonstrate injury in fact in suit challenging set-aside program for disadvantaged business enterprises in the award of highway construction contracts pursuant to the federal Surface Transportation and Uniform Relocation Assistance Act of 1987 and implementing state law?

2. May the federal government condition a grant of funds to a State on the use by the State of race-conscious bid specifications and "goals" in public construction contracting in the *absence* of any evidence that such specifications and "goals" are necessary to remedy any identified current discrimination or any identified effects of past discrimination in any relevant market?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Summary of the Argument 5

Reasons for Denying the Writ 6

I. This Case Is Not Ripe For Review. 6

II. The Eleventh Circuit Properly Found The Petitioners Failed To Allege And Demonstrate Standing To Pursue This Action. 7

III. The Constitutionality of Requirements Imposed On The States By STURAA Is Not An Issue That Is Ripe For Review. 11

Conclusion 13

Appendix A-1

TABLE OF AUTHORITIES

Cases	*Page(s)*
Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co., 389 U.S. 327 (1967)	6
City of Richmond v. Croson, ___ U.S. ___, 109 S.Ct. 706 (1989)	10
Fullilove v. Klutznick, 448 U.S. 448 (1980)	11
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916)	6
Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981)	12
Pennell v. City of San Jose, ___ U.S. ___, 109 S.Ct. 849 (1988)	9
Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982)	9
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	10
Warth v. Seldin, 422 U.S. 490 (1975)	9, 10
Whitmore v. Arkansas, ___ U.S. ___, 110 S.Ct. 1717 (1990)	5, 7, 10

Other Authorities Cited	
Article 3, § 2, United States Constitution	7
Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. No. 100-17, § 106(c), 101 Stat. 132, 145	1, 11, 12
§ 339.0805, Florida Statutes	1, 4
49 C.F.R. §§ 23.61-69 (1989)	1

STATEMENT OF THE CASE

The decision of the Eleventh Circuit Court of Appeals vacated the judgment of the district court and directed the dismissal of this case *without prejudice* because it found that all of the petitioners here (plaintiffs below) lacked standing to challenge § 339.0805, Florida Statutes. The statute provides that "[e]xcept to the extent that the Secretary of the [Florida] Department of Transportation determines otherwise," ("FDOT"), not less than 10 percent of highway construction trust funds shall be expended with small business concerns owned and controlled by specified minorities. *See* Pet.App. 108 for the full text of § 339.0805, Florida Statutes.[1] This requirement is implemented through the FDOT's contract bidding procedures, which are discussed at length in Part I.B. of the court's decision. *See* Pet.App. 12 et seq.

The Eleventh Circuit ruled that petitioners lacked standing because not one had adduced credible evidence in the course of these proceedings to show it had lost a single contract or subcontract because of racial considerations. Pet.App. 39-41, nn. 49,50. The court candidly stated:

> [I]f one of the prime contractors or the subcontractor plaintiff had shown that it had lost or was in imminent danger of losing a specific contract or subcontract because of race in violation of the fourteenth amendment, it would have standing....

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1 The Eleventh Circuit's decision noted that § 339.0805 is modeled after a nearly identical federal statute, the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. No. 100-17, § 106(c), 101 Stat. 132, 145 and implementing federal regulations, 49 C.F.R. § 23.61-69 (1989). Pet. App. 2-3 These require a state to have a set-aside and minority business participation program in order to receive federal funds for highway construction projects. Pet. App. 106 et seq.

Pet.App. 39, n. 49. Of course, if any petitioner can make this showing it may reinstitute its suit because the Eleventh Circuit directed dismissal of the case without prejudice.

Petitioners, however, attempt to dispute the court's conclusion. First, they suggest their standing was never tested "by a motion" in the district court. Pet. 10. They neglect to point out that one of the respondents' defenses asserted in answer to the complaint was that plaintiffs *lacked standing* to bring the instant action. In fact, the magistrate, whose report and recommendation was adopted *in toto* by the district court, *see* Pet.App. 53, found:

> [T]he Plaintiffs have not alleged that any individual Plaintiff was harmed in any *specific instance* on a particular contract or opportunity to bid by the manner in which the Defendants have applied the federal requirements, and have not sought individualized relief with respect to application of the Florida statute or regulations to an individual Plaintiff with respect to a particular contract or opportunity to bid. Damages are not sought in this case. *In short, there are no allegations that the Florida program has been applied in [an] unconstitutional manner to a particular Plaintiff having standing to make that claim.*

Pet.App. 73-74 (first emphasis in original; second, supplied). Clearly, the question of the nature and extent of petitioners' injury was raised and addressed, and findings made thereon, in the district court.

Second, petitioners quarrel with the Eleventh Circuit's view of the evidence. Pet. 2-3, 10-11 and n. 11. Of the nine petitioners, only two offered any evidence whatsoever concerning the injuries allegedly suffered. One, Mr. Brooks, testified as to a letter he received from another party, Cone Corporation, stating that Cone Corporation, in order to meet

the disadvantaged business enterprise ("DBE") goal on a project, had used someone else's "quote" in submitting a bid to FDOT, although Brooks had submitted a lower price quotation. *See* transcript of preliminary injunction hearing, Resp.App. 3, 30-31. As the Eleventh Circuit pointed out, there was no evidence that Cone was awarded this contract, and thus no evidence Brooks was injured by the DBE requirement. Pet.App. 40-41, n. 50. And as further noted by the Eleventh Circuit the FDOT merely sets a percentage amount of the contract to be performed by DBEs. It does not mandate to the general contractor that particular subcontracts be reserved for DBEs. That choice is left entirely to the prime contractor. Pet.App. 15-16.

Petitioners also contend that both Mr. Cone and Mr. Brooks testified about "increased costs and risks" caused by the DBE program and a "decline" in volume of business. Pet. 11 citing to transcript of preliminary injunction hearing at 39-83. This testimony is not reproduced in petitioners' appendix. Respondents submit that it is so vague and imprecise that it simply could not support a conclusion that petitioners were injured by any DBE requirement. Rather than attempt to summarize this testimony or argue its content, respondents reproduce it in the appendix to this brief.

The Eleventh Circuit also acknowledged the naked suggestion in Mr. Cone's deposition that he had submitted a low bid on one project but had lost out to the second low bidder because Cone did not meet the "minority goal." Resp.App. 45. Mr. Cone did not say with certainty that the winning bidder met the DBE goal. Resp.App. 46. The court found this evidence too vague and lacking in specificity to conclude that it demonstrated a constitutional injury. Pet.App. 40, n. 50. The petitioner does not refer to this testimony or argue that it proved an injury. As it is terse in the extreme, respondents simply reproduce the testimony in the appendix. *See* Resp.App. 45-46. As the Eleventh Circuit observed, Mr.

Cone admitted not attempting to present a good faith justification for not meeting the DBE goal for that contract. Pet.App. 40, n. 50; *see also* Resp.App. 45-46.[2]

The amended complaint petitioners filed in the district court contains only the most general allegations of harm, failing even to allege which plaintiff suffered what type of injury. No plaintiff alleged it had ever lost a contract as a result of the operation of § 339.0805, Florida Statutes, or because of unlawful discrimination. *See* Resp.App. 48-49. The various methods by which an aggrieved contractor may challenge the award of a contract on equal protection grounds are, however, discussed at length by the Eleventh Circuit. *See* Pet.App. 18-26. Under § 339.0805, Florida Statutes, the Secretary of FDOT may determine that less than 10 percent of the trust funds earmarked for a project should be expended with DBE's. Indeed, testimony by a former plaintiff in deposition confirmed that many projects had goals of less than 10 percent, and the lower courts so found. Pet.App. 16-17, 66. The Eleventh Circuit did not find these remedies inadequate and the amended complaint did not attempt to so assert.

Finally, it should be noted that the only ruling *on the merits* of any issue in this case was the district court's ruling that § 339.0805, Florida Statutes, could not be used constitutionally as a basis for a *separate* state program using state funds exclusively to favor disadvantaged businesses in road construction programs. Pet.App. 103. That is because in the enactment of the state statute no legislative findings were made with respect to past discrimination in state road

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2 The procedure by which a bidder may justify not meeting DBE contract goals is explained in the order of the district court. Pet.App. 66-67.

construction contracting.[3] However, the district court's order merely denied petitioners' renewed motion for preliminary injunction and their motion for summary judgment. Although the analysis given the Florida statutory scheme as implementing a *federal program* was generally favorable on constitutional grounds, the district court correctly *declined* to rule on the constitutionality of the federal law in the absence of appropriate federal defendants. Pet.App. 97-98.

SUMMARY OF THE ARGUMENT

An adequate demonstration of standing rests upon both specific allegations and proof of injury in fact. Neither the amended complaint nor the proof offered in the district court measure up to the pleading and evidentiary requirements established by this Court and reiterated in its recent decision in *Whitmore v. Arkansas,* ___ U.S. ___, 110 S.Ct. 1717 (1990). None of the petitioners alleged or proved a single instance in which one would have been awarded a contract but for the enforcement of minority set-aside provisions. Standing cannot rest upon hypothetical injury or court embellished pleadings. *Whitmore, supra.*

The second question presented ultimately seeks a ruling on the constitutionality of the federal transportation law mandating state set-asides. Neither the Eleventh Circuit nor the district court ruled on this issue, and, in fact, the

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3 Although the Eleventh Circuit's decision to vacate the district court's order would apparently affect the prohibition on use of state funds in a state program, the FDOT now administers no such program. A state study of past discrimination was conducted subsequent to the district court ruling, but until appropriate legislative action is taken FDOT has determined not to use state funds in a manner inconsistent with the district court's analysis and ruling.

petitioners did not join a federal defendant to present evidence and argument in defense of the federal law. In this posture, the issue is not ripe for review.

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT RIPE FOR REVIEW.

The petitioners made little effort in the trial court to show that they were adversely affected in specific ways by the federal/state highway construction program that calls for a ten percent set-aside of federal/state funds for disadvantaged business enterprises. Not one of the nine petitioners was able to show a specific, concrete injury. Their argument at this point is that they have standing simply because they bid for state highway construction contracts in Florida. Respondents submit, *infra,* that *some* injury not entirely speculative in nature must be shown.

It is apparent, however, that the real question petitioners seek to bring before this Court is the constitutionality of the *federal* law that requires state set-aside and goal programs in order for a state to remain eligible for federal highway construction funds. *See* Pet. Pt. 2. While that issue may well warrant this Court's consideration at some point, there was clearly *no* definitive ruling on it by the Eleventh Circuit *or* the district court. It is not this Court's practice to rule on questions presented in such a posture. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.,* 389 U.S. 327, 328 (1967), citing *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916). Consideration of such a significant issue should not be encumbered by dubious standing claims, particularly when it is open to petitioners to refile their suit. Moreover, for reasons unknown, no federal defendant has been joined to shape the evidence and sharpen the arguments on the federal statute. Surely, the

constitutional question petitioners would have this Court address can be presented in a better posture.

II. THE ELEVENTH CIRCUIT PROPERLY FOUND THE PETITIONERS FAILED TO ALLEGE AND DEMONSTRATE STANDING TO PURSUE THIS ACTION.

The United States Constitution, Art. 3, § 2 limits the jurisdiction of the federal courts to actual cases and controversies. In order to meet the case or controversy requirement, a plaintiff must demonstrate standing. This Court recently summarized the basic principles that inform the standing doctrine in *Whitmore v. Arkansas*, ___ U.S. ___, 110 S.Ct. 1717 (1990), and these principles were analyzed at some length in the decision below. In *Whitmore*, the Court stated:

> To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an "injury in fact." That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is "distinct and palpable," *Warth, supra*, 422 U.S., at 501, 95 S.Ct., at 2206, as opposed to merely "[a]bstract," *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974), and the alleged harm must be actual or imminent, not "conjectural" or "hypothetical." *Los Angeles v. Lyons*, 461 U.S. 95, 101-102, 103 S.Ct. 1660,1664-1665, 75 L.Ed.2d 675 (1983). Further, the litigant must satisfy the "causation" and "redressability" prongs of the Art. III minima by showing that the injury "fairly can be traced to the challenged action," and "is likely to be redressed by a favorable decision." *Simon v.*

> *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1926, 48 L.Ed.2d 450 91976); *Valley Forge, supra,* 454 U.S., at 472, 102 S.Ct., at 758-59.

Id. at 1722-23. The petitioners failed to meet any of these criteria.

The amended complaint, as the Eleventh Circuit recognized, Pet.App. 39-41, consists of nothing more than "bald conclusions" to the effect that petitioners have been injured. In fact, the pertinent allegations of the complaint barely amount to that, blandly stating:

> COUNT VI
> EFFECT ON PLAINTIFFS; IRREPARABLE HARM
>
> 66. Each of the plaintiffs has in the past, currently does and will in the future seek to perform work in the highway construction industry in Florida.
>
> 67. Each of the plaintiffs has been injured in its business or property as the result of the racial discrimination currently being practiced by the State of Florida in the award of highway construction contracts.[4]

The deficiency of these allegations requires no exposition. Such assertions clearly do not meet the most minimal pleading requirements:

> The litigant must clearly and specifically set forth facts sufficient to satisfy...Art. III standing

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4 Only Count VI of the amended complaint purports to allege injury. The complaint is not reproduced in petitioners' appendix. Respondents therefore reproduce all of Count VI in the appendix to this brief. *See* Resp.App. 48-49.

> requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.

Whitmore, supra, at 1723 citing *Warth v. Seldin,* 422 U.S. 490, 500 (1975). The necessity that a plaintiff plead a "distinct and palpable" injury to himself obtains "even if it is an injury shared by a large class of other possible litigants." *Warth, supra,* at 501.

Petitioners' actual factual showing likewise demonstrated neither injury in fact nor the probability of future injury resulting from unlawfully discriminatory action under § 339.0805, Florida Statutes. Not one petitioner established conclusively that it was a low bidder who had lost a contract or was in immediate danger of losing a contract because of racial considerations.[5] Although petitioners also suggest there was testimony about increased costs and business risks, Pet. at 11, the transcript is as vague as the petition's discussion is terse. As injury, the claim is conjectural at best, not "distinct and palpable." This being so, petitioners' reliance on *Pennell v. City of San Jose,* ___ U.S. ___, 109 S.Ct. 849 (1988), is particularly inapposite. There, the Court noted it had to determine the question of standing essentially on the basis of the pleadings and that the record "[left] much to be desired in terms of specificity for purposes of determining the standing of appellants to challenge the ordinance." *Id.* at 855. Here, petitioners' complaint allegations clearly failed to meet the "irreducible minimum" for standing, *see Valley Forge Christian College v. Americans*

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5 Petitioners argue that "it was understood in the trial court" that Cone Corporation was in fact awarded and did perform the contract as to which it had rejected a price quotation from O. B. Brooks in favor of a higher quotation from a minority subcontractor. Pet. 11, n. 11. What was understood is only what is in the transcript, and the transcript fails to substantiate this asserted understanding.

United for Separation of Church and State, 454 U.S. 464, 471 (1982), and even when allowed to present evidence not one of nine could demonstrate injury in fact.

Similarly, petitioners take a skewed view of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), arguing that standing of the plaintiff therein depended upon four conditional events plus an inference. But there the plaintiff averred that he would probably move to a certain housing development were it not for discriminatory official action that prevented its building. A plaintiff in such circumstances could not be more definite about an event that public officials will not allow to occur. In contrast, here highway construction contracts are awarded on a frequent and ongoing basis. All petitioners needed to show was their failure at some point over a period of years to win a contract award because of discriminatory action. This they failed to do. Petitioners may find the law distressing, but the standing inquiry in no way depends on the merits of a plaintiff's contention that particular conduct is illegal. *Warth, supra.*

Although one petitioner candidly acknowledged that the lawsuit which ultimately culminated in this Court's decision in *City of Richmond v. Croson,* ___ U.S. ___, 109 S.Ct. 706 (1989), was the impetus for petitioners' challenge to § 339.0805, *see* testimony of Douglas P. Cone, Resp.App. 37. not one has demonstrated a degree of injury comparable to that suffered by the prime contractor/plaintiff in *Croson.* There, the prime contractor (J. A. Croson Co.) submitted the *only* bid to the city on a project subject to the City's 30% minority set-aside requirement. Twenty-one days after the prime bids were due, a minority business entity submitted a higher bid. The city rejected Croson's request for a waiver and rebid the project. Without doubt, Croson suffered injury

in fact. And equally certain, no petitioner here either alleged or proved any comparable injury.[6]

Given the failure of petitioners' allegations *and* proof, the Eleventh Circuit ruled that it was incumbent upon them to prove that the Florida law and implementing regulations would plainly require the Secretary of the Florida Department of Transportation to deny equal protection. Pet. App. 47. After carefully and at length canvassing the various provisions by which an aggrieved bidder could either demonstrate a good faith effort to comply or protest the award, *see* Pet. App. 17-26, 44-50, the court concluded that the statute on its face "does not direct the Secretary to violate the fourteenth amendment...." *Id.* at 47. As the statute was not facially unconstitutional, petitioners lacked standing to seek declaratory or injunctive relief. *Id.* at 48.

Petitioners do not even argue this point or contend that, despite the many available checks, the statute *commands* unconstitutional actions. Accordingly, they have demonstrated no reason for this Court to grant a writ of certiorari.

III. THE CONSTITUTIONALITY OF REQUIREMENTS IMPOSED ON THE STATES BY STURAA IS NOT AN ISSUE THAT IS RIPE FOR REVIEW.

Petitioners' second argument seeking to justify the grant of the writ asserts that the set-aside program implemented by § 339.0805 is unconstitutional even though required by federal law, i.e., the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA). Given that the

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6 Petitioners also cite *Fullilove v. Klutznick*, 448 U.S. 448 (1980), but not for what it says about standing. In *Fullilove*, the plaintiffs alleged three specific instances where they would have been awarded contracts were it not for enforcement of set-aside requirements. 448 U.S. at 480, n. 71.

district court concluded that the Florida law in question was "not...an independent state legislative act," Pet. App. 97, but was rather "an extension of the federal program," Pet. App. 97, "enacted and amended in obvious lock-step with the federal statute," Pet. App. 101, respondents submit that petitioners' attack inescapably calls into question the constitutionality of STURAA as well as the Florida law. Indeed, the petition acknowledges that at the very least the Court will have to construe STURAA, Pet. at 22, n. 19, and that the question is, in petitioners' view, *whether Congress has the power to permit states to use race-conscious measures to secure federal funds.* Pet. at 23.[7] Neither the court of appeals nor the district court ruled on this constitutional issue, the district court refraining because of the absence of an appropriate federal defendant.

In this posture, it is clear that the issue of the constitutionality of the Florida and federal programs is premature and not ripe for resolution by this Court. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294-295 (1981).

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7 Although the second question presented expressly questions the constitutionality of the federal law, petitioners, at the preliminary injunction hearing, disclaimed any intent to attack the federal law. *See* Resp.App. 43. The amended complaint did not seek any declaration on the constitutionality of the federal law. *See* Resp.App. 49-50. Their position on STURAA was ambivalent throughout these proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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TABLE OF CONTENTS

Page(s)

1. Excerpts from hearing on plaintiffs' Motion for Preliminary Injunction A-1
2. Excerpts from deposition of Douglas P. Cone . . . A-44
3. Excerpts from Amended Complaint A-47

United States District Court

Northern District of Florida

CONE CORPORATION, *PLAINTIFF,* VS. FLORIDA DEPARTMENT OF TRANSPORTATION, *DEFENDANT.*	CASE NO. TCA 88-40042 TALLAHASSEE, FLORIDA MARCH 25, 1988

PRELIMINARY INJUNCTION HEARING BEFORE THE HONORABLE WILLIAM W. STAFFORD

APPEARANCES:

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TRANSCRIPT PRODUCED BY COMPUTER SHORTHAND

* * * *

Q Mr. Brooks, based on your experience as a specialty subcontractor in this industry for that amount of years, what is the effect on non D.B.E., non N.B.E. specialty subcontractors been on the state set aside program?

A You mean the overall effect?

Q Yes, sir?

A Devastating.

Q In what way?

A Uh —

THE COURT: Are you talking about to your business or everybody's business?

THE WITNESS: I am referring to non minority specialty subcontractors, Your Honor.

MR. SCHLANGER: Generally, from his knowledge of the industry, Your Honor, generally what he knows in that segment it of the industry.

THE COURT: Okay. Go ahead.

Q How — what do you mean by devastating? How has it affected specialty subcontracting?

A Well, due to the goals or quotas set by the D.O.T., the situation has been for the last several years, specifically since 1982-83 that our quotations and our prices for D.O.T. work that we would normally bid to the prime contractor most of them have to be trashed.

THE COURT: Most what?

THE WITNESS: Most of our quotations of the primes they throw them in the trash nowadays. They can't use them.

Q Why is that?

A In order to meet their goal.

MR. CHILES: I object, I am not sure this witness has the competency to know what reasons contractors have for doing what they do or not do.

THE COURT: If he is telling me what they tell him. Not what they tell him?

MR. CHILES: I object on the basis of hearsay.

THE COURT: If he's not offering it for the truth of the statement, it is not hearsay.

And I hope, Mr. Schlanger, you are asking this witness what the contractors tell him is the reason he's not getting any work?

MR. SCHLANGER: Yes, sir.

THE WITNESS: I —

THE COURT: Wait, wait, I am taking this for what he's telling me they told him, not whether that is the truth.

MR. SCHLANGER: Yes, sir. We will follow it up with a general contractor talking about it.

THE COURT: Let's go.

Q The question, I believe was, what have you been told by the contractors is the reason you are not getting the work?

A Well, it is simple. I don't think its anything — in order to meet their goals, they simply cannot use our prices.

Q Are you aware of the number of minority certified D.B.E.-M.B.E. contractors in the specialty contractor area?

A I sure am.

Q How has that changed over the years?

A It has increased significantly.

Q Has it increased in the specialty area different from the way its increased in the other area contracting?

A Yes.

Q How?

A Accordingly to my latest count, and I go through the M.B.E. book about every six months, we have approximately eighty-four certified D.B.E.'s in our specialty area.

That is approximately plus or minus two.

Q how many companies total are there in your area?

THE COURT: When you are taking about area, you are not talking about geographic area?

MR. SCHLANGER: We are talking about the nature of the work you do, right?

THE WITNESS: Right. We work the entire state of Florida.

THE COURT: Okay.

So you are talking about from —

THE WITNESS: Pensacola to Key West.

THE COURT: Okay?

THE WITNESS: Yes.

Q Overall, in the highway contracting business, have minorities and E.B.E.'s tended to cluster in the specialty contracting area rather than other areas?

A Well, yes, sir. It would seem to me that is the only place they could cluster.

Q Why is that?

A It takes a lot of money to work your way up to a prime contractor and a lot of experience and years. It is not something you do overnight.

MR. CHILES: Excuse me, your Honor. Let me show Mr. Chiles the next set of documents.

MR. CHILES: Your Honor, I object to this entire series of documents based on the fact it is self-serving hearsay and letters purportedly by other contractors confirming what Mr. brooks has told us. It makes it redundant.

We don't have those individuals here to testify. I think it is too far removed to be relevant to this situation.

THE COURT: What are these?

MR. SCHLANGER: Mr. Chiles, Your Honor —

(Hands to Court)

MR. SCHLANGER: These are exhibits six through twelve. They are letters to Mr. Brooks that he received from the various general contractors explaining they could not take his quotes because of the D.B.E. requirements.

MR. CHILES: Your Honor, I also suggest the dates on them indicate they were prepared specifically to be brought to this proceeding today. A couple of them are dated yesterday or a couple of days ago.

MR. SCHLANGER: Let me address that Your Honor.

Q Mr. Brooks, is it correct that these letters were specifically written for this proceeding?

A That is correct.

Q And do these confirm what contractors have been telling you for years?

A The contractors, a lot of them, were reluctant to give us information. And —

MR. CHILES: Could we have a ruling on the objection? Hold off on the testimony?

THE COURT: These will not be received in evidence. They are not letters kept in the ordinary course of business. They are hearsay. The objection is sustained. They will be marked and kept for the record. They are not entitled to be admitted as substantive evidence in this case.

MR. SCHLANGER: I agree that it is to the extent they are offered for the truth of it, Your Honor, its true. But in terms of the effect of his business and why he's been told it.

THE COURT: You are offering testimony here by people who are not present and denying the defendant's the right to cross examine. They don't meet the exception of the hearsay rules.

MR. SCHLANGER: I do move admission of plaintiff's five, which is the chart Mr. Brooks made up concerning his gross volume and the amount.

THE COURT: Is this the percentage — the letter, yes, I don't have any problem with that.

I think whatever objection he had goes to the weight and not admissibility. So okay, that is received. Number five. Okay.

(Plaintiff's exhibit five received in evidence)

BY MR. SCHLANGER:

Q Mr. Brooks, do you have any way — without speculating — do you have any possible way of calculating how much money you could lose at each letting by virtue of the D.B.E. requirement being in place and D.B.E.'s getting specialty subcontracting bids because of their set aside requirement?

A I believe I would have trouble being specific on that, because when you go in with a subcontract price, you don't know if you have got the job or not. Regardless of why.

MR. SCHLANGER: I have no further questions.

THE COURT: Mr. Chiles?

MR. CHILES: Yes, Your Honor.

–CROSS EXAMINATION–

BY MR. CHILES:

Q Let's take it from the back and go backwards, Mr. Brooks.

I believe you just indicated as to that last question, that you could not determine, without speculating, because you would not know whether your had — whether you would have got the job any way?

THE WITNESS: So, sir. Not deny it, not until the next day when its bid and when everything is sorted out. Its usually thirty days before the subcontractors are notified whether or not he was selected on that project. I haven't had any problem with that lately.

Q But in any event, once the matter has been resolved, that you didn't get the job, you could go back and ask the contractor what all the bids were, could you not, for the subcontractors in your specialty?

A From them?

Q From the contractors?

A I probably could, but I wouldn't see any reason to.

Q Well, if you were trying the determine how much damage you had lost, you could do that and you could find out exactly how much the bids were and how far you were from the low bid, couldn't you, sir?

A I don't base my estimates on other people's experience. I base them on my experience.

Q I understand. When we are talking about dollars for bids, you submit an actual dollar amount for the bid you are willing to do the work for, do you not?

A Yes.

Q And every other subcontractor bidding for that same specialty, does the same thing, does he not?

A Exactly.

Q You can tell the exact differences between your bids and every other bid by looking at those dollar figures, can you not?

A To the printout. Yes, sir. I understand.

Q So you could determine then you were or not the low bidder or if the D.B.E. who took the job instead of you was the low bidder or not, can you not?

A I could determine that, right.

Q You can determined the exact difference between the accepted price and your price, can you not?

A Yes.

Q If you didn't get the job because a D.B.E. was required to get the job instead, you could determine the exact amount of money you lost, could you not?

A It won't be the money lost because it would depend on the profit margin. You would just be saying —

Q Well you also, in fact, in your profit margin —

THE COURT: Speak one at a time.

Go ahead Mr. brooks you finish, then you go Mr. Chiles.

A Say I bid a job that has got a hundred thousand dollars worth of sod on it. That is not a hundred thousand dollars profit. It might be a hundred dollars profit.

Q But you also factor in your profit before you bid before you submit it?

A Right.

Q So you know the exact amount of profit you know you are going to get before you get that job, don't you, sir?

A No. I know what I hope I can make.

Q And assuming that is pretty much on the mark, you can determine how much profit you have lost, can you not, sir?

A Not exactly, no, sir.

Q But you can do it close enough that we are not talking about speculation, are we?

A No, no.

Q Okay.

Q Mr. Brooks, isn't it true that you could qualify as a prime contractor yourself in this area of grassing and sodding?

A No, sir.

Q That is not true?

A No, sir.

Q There is not an area for grassing and sodding in which you could be qualified?

A Not as a prime contractor.

Q Okay. Let me ask you this. Is the Department of Transportation that sets the goals to the contractors for your particular specialty?

A Is it the D.O.T.?

Q Yes, sir?

A I think so.

Q You don't know that for a fact?

A Yes, sir, I know so.

Q You know so?

A Yes, sir.

Q It is your testimony when a contract is let, the specifications are set out by D.O.T., they specifically say, contractors, when you bid on this, you will have to submit ten percent D.B.E. subcontract for the specialty of grassing and sodding?

A No, sir.

Q In fact, it is the contractors that make that decision isn't it?

A You are right.

Q So in fact, your claim is not against the Department of Transportation, it is against the contractors, isn't it?

A No, sir.

MR. SCHLANGER: I object. It is a leading conclusion as to who his claim is against.

THE COURT: I can read the complaint. I understand the question for what it means. Go ahead.

Q Sir?

A Did I answer the question?

THE COURT: If you are using the word complaint — are you saying his gripe is with the general contractor and not with the D.O.T.? Is that what you are asking him?

MR. CHILES: Yes, sir.

A No, sir. It is not. I understand the program a little more deeper than that and I do understand how it works.

Q But in fact, it is the contractor who said that the D.B.E., rather than you, is going to get the that specialty subcontract, isn't it. It is not the Department of Transportation is it?

A You want the truth? The prime has no choice than to meet the goal.

Q No, sir. My question —

THE COURT: Wait a second. He's answering your question.

MR. CHILES: Your Honor, he's not responding to the question I asked.

THE COURT: I thought it was. Go ahead.

THE WITNESS: I thought I was, too.

THE COURT: Go ahead.

Q Go ahead.

A The prime has an established goal set by the D.O.T. on that job. It does not say, you have to take the grassing here. But if ten percent of that job is subgrassing what is he going to sub?

Q But the bottom line is, its his determination on who to sub it and how to sub it, right?

A Right.

Q Isn't it also true that up to sixty percent of materials purchased can go towards meeting the D.B.E. goals?

A Sure. That is true. If they are from a minority supplier.

Q That is right. So in fact, a contractor could purchase the grass from another company and let you do the laying of it, couldn't they?— And that would still meet their goal up to sixty percent; would it not, sir?

A Well, we are being hypothetical here. I really don't think there would be enough money involved though meet the goal.

Q But it could happen, couldn't it, sir?

A But, that has been examined before and it really hasn't worked because he doesn't generate enough dollar volume on the purchase of the material. At least we have not found that to be the case.

Q With regard to exhibit five, the document you prepared indicating your total work and total D.O.T. work?

A Yes, sir.

Q When you say total D.O.T. work, is that, again, your subcontract to the contractor or is that your contract directly with the D.O.T.?

A This is total D.O.T. work. '83?

Q Yes, sir.

A We did six hundred ninety-eight thousand three hundred dollars worth.

THE REPORTER: Repeat that, please?

A In '83 we had six hundred ninety-eight thousand three hundred dollars and forty two cents. That was our total D.O.T. work, that percentage at that time was thirty-two percent.

Q Okay. But my question, sir, is: is that work that you contracted with D.O.T. for, or is that work you contracted with the contractor —

A No, sir, this is under prime contractors, right.

Q And in 1983, there were D.B.E. goals in place, were they not?

A Yes, sir. Yes, sir. What happened in '83 is that we were winding down a lot of the old interstate projects on I-75 from Punta Gorda up to Tampa, and the long job that we had acquired back in about '77 or '78 were winding down.

And they were three or four year projects. This was the sort of tail end and that is when the bottom fell out of the D.O.T. work for us.

Q You say the bottom fell out. In 1986, it looks like you substantially increased your state work. Isn't that true?

A Well, I considered in '83 we did almost seven hundred thousand. In '86, we did two hundred seventy-nine thousand — no, sir, that is not a increase.

Q Well, from the years right previous to that it is a substantial increase, isn't it?

A From '85?

Q From '85 and '84?

A Yes, sir. There was really no D.O.T. work those two years to speak of.

Q In '86 and '87 you are back up above ten percent both of those years, are you not?

A Yes, sir. But still the total volume of our company.

Q Let's look at it this way. You say your overall total work has amounted to somewhere between two million and about two point six million in the each of the years listed here?

A Yes.

Q Would you say your overall amount of work has pretty much stayed consistent?

A Yes, we have had to turn to the private sector to survive.

Q So the fact that you have lost state business whether it was because of D.B.E.'s or whether you simply didn't make the low bid, hasn't affected your overall business, has it, sir?

A Yes, sir.

Q It has?

In '87 then. The largest amount of overall work you have done in any of these years listed. That would indicate that you have been loosing work?

A With the D.O.T., yes, sir.

Q Well, you maintained the work somewhere, haven't you?

A Yes, sir.

Q Based on that fact, the fact that you have and, in fact, increased your total work, how is it that you contend that you have been devastated by this program?

A All you have to do is look back to see what we have had to do to adjust. We are primarily speaking of making our living and we do have fifty employees. Better than fifty now.

We have had to turn almost entirely to the private sector. We are doing very little D.O.T. work and I think it is obvious what the cause is.

Q Have you ever sued a contractor for loosing a job?

A No, sir.

Q Have you ever made a challenge to a D.B.E. that got the bid over you?

A No, sir.

Q Are you aware that you could have done that?

A Yes, sir.

Q Are you aware that there are procedures where you can protest any bid?

A That is right.

Q Have you ever done that?

A No, sir.

Q The fact of the matter is, you have not be hurt enough to bother to do that, have you, sir?

A As a matter of fact, I have been a D.B.E. myself.

Q I am sorry, what is that?

A As a matter of act, I have been a D.B.E. myself but that is not why I am here.

MR. CHILES: I have nothing further.

THE COURT: Any further questions?

MR. SCHLANGER: No, Your Honor.

THE COURT: Let me ask you. What kind of business did you do in '82?

THE WITNESS: I didn't go back that far, but it was less than two. If my memory serves me right, it was around one point six.

THE COURT: How much of that was —

THE WITNESS: In '82, it was probably fairly well graduated. If I went back and dug the old boxes out, you could work it over five years back up to ninety percent.

THE COURT: Ninety percent of what?

THE WITNESS: Of our total work was with the D.O.T.

THE COURT: Okay. You indicate that in '83 and '85 you — part of your — I guess this is gross profit?

THE WITNESS: No, sir. That is not profit at all. That is total dollar volume. It is not profit. I wish it was.

THE COURT: This is the amount of work you did for everybody?

THE WITNESS: Yes, sir. Right.

THE COURT: And these figures reflect decrease in D.O.T. work. To what do you attribute that?

THE WITNESS: The decrease of the Department of Transportation work?

THE COURT: Yes. Where as your overall work stayed about the same.

THE WITNESS: Yes, sir.

THE COURT: In fact, in '84, you did about three hundred thousand dollars more than you did in '83 and about three hundred thousand more than you did in '85?

THE WITNESS: That is right.

THE COURT: Were you devoting more of your time to getting private business or, so you don't have to mess with these?

THE WITNESS: Yes, sir. Private work is out there.

THE COURT: So you don't have to mess with these oppressive government regulations?

THE WITNESS: Yes, sir. The private work is still out there.

THE COURT: You don't have to worry about all these official —

THE WITNESS: No quotas or anything. The work is there.

THE COURT: Let me ask you this question, Mr. Brooks. Let's suppose that next week the legislature decided they were going to get the State of Florida out of the road business all together and contract with Red Blond or somebody, that you build the highways and they lease it from you.

Okay. Do you think your company would go belly up?

THE WITNESS: No, sir. I would survive.

THE COURT: You could survive?

THE WITNESS: Yes, sir.

THE COURT: You could do private work and make a living?

THE WITNESS: I would survive.

THE COURT: As these figures reflect?

THE WITNESS: Yes, sir, we will survive.

THE COURT: Let me ask you, the increase in your business, your D.O.T. work in '86 and '87, what do you attribute that to? I mean you went from thirty-three thousand and some change in '85 to two hundred ninety-six thousand in '87 almost?

THE WITNESS: Those was pretty close years as far as the total D.O.T. work.

THE COURT: Sir.

THE WITNESS: I am just trying to think.

THE COURT: Do you relate that at all to any of this minority business or disadvantaged business thing?

THE WITNESS: I think that by this time.

THE COURT: By what time?

THE WITNESS: By '86 and '87 — I am trying to think of jobs we have got. None of them were very big in those two years.

All I can think of is where we got some small jobs were the goal was lower or some contractors filled their goal with another area, with another specialty.

THE COURT: Have the regulations changed or anything like that?

THE WITNESS: No, sir, not that I am aware of.

THE COURT: I don't have any further questions.

MR. SCHLANGER: May I ask one question for clarification?

-CROSS EXAMINATION-

Mr. Brooks, I am a little bit confused in the answer you gave to the question of the Judge.

Q In nineteen eight-three, did you voluntarily stop bidding DOT work because you didn't like the bureaucracy or stop being able to get your quotas accepted.

A No, sir. We have been coming to Tallahassee for twenty years. We have never, we have bid every job. Bid every month, every job that is let.

Q So the decrease was not due to you saying, gee, I don't want to bid these any more?

A No, not at all.

Q It was due to contractors using grassing for their D.B.E. requirements?

THE COURT: That is a leading yes.

MR. SCHLANGER: Yes, sir.

THE COURT: It could be. Of course, that somebody underbid him. See, that is what you haven't —

MR. SCHLANGER: We will have a general contractor up here, Your Honor, and he can testify to that.

THE COURT: Well, okay. Go ahead. Anything further? Any questions Mr. Chiles?

MR. CHILES: No, sir.

MR. SCHLANGER: Thank you.

THE COURT: You may step down.

MR. SCHLANGER: Your Honor, I call Douglas Cone to the stand.

THE COURT: All right.

-DOUGLAS CONE, PLAINTIFF'S WITNESS SWORN-

THE CLERK: State your full name and spell your last name.

THE WITNESS: Douglas P. Cone, C-O-N-E.

-DIRECT EXAMINATION-

Q Mr. Cone. What is your business and position?

A We are in the general contracting business and I am the president of the corporation.

Q Would you please tell the court what your educational background is?

A Well, the usual highschool and I graduated from civil engineering at the Georgia Institute of Technology.

Q When did you do that?

A 1950.

Q Could you describe for the Judge your employment history since 1950, please?

A Primarily with the Cone Brothers Contracting Company and I sold that; and then Florida Mining Materials which is a related materials company to contracting; and then we established our own contracting company again in 1979.

Q What happened in 1979?

A We stared bidding state road department work again.

Q Is the corporation called a certified prime?

A Yes, we are prequalified as being a prime with the State.

Q Mr. Cone, are you on a member of any transportation committees or task forces?

A Yes, several. One on the grading system they use for prequalification and another on the estimates which we have had one meeting and Miss Moore has got me on the task force of the D.B.E.'s.

Q What is the function of that task force on D.B.E.'s?

A I think primarily they wanted some industry input as to how they are handling the minority business program and what can be done to try to improve it.

Q Mr. Cone, are you familiar with the way the D.B.E. set aside programs of the State of Florida, has impacted the Cone Corporation's bidding practices?

A Well, yes.

And to directly answer that, yes.

I am also familiar with its impact in the general contracting area in Florida.

Q With respect to your bidding practices for the Cone Corporation, how has it affected you?

A Well, in several different ways.

We have to keep a preponderance of records.

We have one girl that doesn't do anything but keep records. When we use a D.B.E., and to make the percentage goal, we have to let him purchase the materials. And when we do that, always, we are — the supplier of the materials requires that we make joint checks for that portion that is owed him for the materials.

Q Why is that?

A Well, because usually they, on the M.B.E.'s, almost always the supplier serves notice of intention to file lien. And when we do that we have a company policy we pay the joint checks. In fact some of the suppliers require we pay with joint checks or we will not sell.

THE COURT: Joint checks to who?

THE WITNESS: To the implement minority business people. It is not only minority business but sometimes its any subcontractor.

Q The check goes to the supplier, right?

A Yes — no, the check goes to the minority contractor. And in turn, he and the supplier get together and endorse the check jointly.

THE COURT: You are talking hypothetically, we would say a check made payable to the Hispanic Paving Company and the —

THE WITNESS: Concrete supplier.

THE COURT: And the Haitian Concrete Company, or something. Is that what you are talking about?

THE WITNESS: Yes.

THE COURT: All right. I got it. Thank you.

Q And that is to insure the supplier gets paid?

A Yes. Because we don't have to pay twice.

THE COURT: You pay the sub and he owes — if doesn't pay the supplier than you have got to pay twice?

THE WITNESS: Then we have had it, that is right.

Q Aren't subs bonded just like everybody else?

A No. Most of the minorities — in fact — most of the non minorities are not bondable. They will — I don't know of any minority sub that we have been able to get a bond out of.

Q Does the fact that you have to use minority subs who are not bonded, change the risks involved for your company?

A Yes. If we can, if we can get a bond. Naturally, we try to get one on most all the subcontractors, but that is almost impossible on minority for sure.

We have got another area that worries us considerably and that is the many of the minority contractors, for some reason, a lot of times they will take too much work, and then when we call on them — just like we had a job in Palm Beach county, and if we don't finish the job on time, we become delinquent with the Road Department.

And when we tried to get this minority in — and he's done work for us before — and we tried the get him in. And it was about two weeks, and one of the last things to be done on the job, the approach labors on the breach.

This was done in the City of Belle Glade, he couldn't — or wouldn't come in, so we were faced with the possibility of becoming delinquent under the new rules or new laws, or using our own forces to finish the job in time, which we did, which is a — contrary to the M.B.E. thing.

We did not meet the M.B.E.'s, so consequently, the State is holding up some sixteen thousand dollars of final payment on our job.

So we are kind of between the devil and the deep blue sea when it comes to making a decision if the minority doesn't do it.

And we have these problems frequently, that they can't get in on time, they will tell you Monday, and it will be a week or two weeks later when they come in, and a lot of times —

THE COURT: Like building a house. Right?

THE WITNESS: Exactly, yes.

Q But if you don't get — if you, as the prime — don't get that job finished, you are saying there are penalties from the State?

A Absolutely.

In fact monetary penalties and punitive. We can't put C.D.'s up with the State any more if we become delinquent. Not only have you got liquidated damages, you have got almost triple damages, you would say.

MR. SCHLANGER: Let me — may I approach the witness, Your Honor?

THE COURT: Yes.

Q Let me ask you what is marked as plaintiff's exhibit 13 and I ask you if you recognize that as a letter from the Cone Corporation?

A Yes, I do.

Q To whom was it addressed?

A Mr. Bert Brooks.

Q That is Mr. Brooks who testified earlier?

A L. B. Brooks and Sons Grassing.

Q Would you relate the circumstance of the writing of that letter, please?

A Well, actually it was my son that wrote it. He was the Vice President of the corporation. And just what it is, that we were becoming a little bit disgusted.

Actually, on — when you get into these specialties. its about the most jobs that you can make your minority quotas with, is grassing, fencing, curb work, and it is very limited to get ten percent.

Its like we have got a ten million dollars job in Safety Harbor right now, and we had — so that means, I think it was a ten percent set aside, and it means we have got to come up with a million dollars worth of minority subcontractors.

In this case, it is a bridge job, we don't know of any minority contractor that has the necessary equipment to pour decks or set beams.

And we certainly don't want to get into the sham situation which is another burden that worries us.

In fact, I would imagine we are in some gray areas now, which we have discussed with the F.D.O.T.

We have a man right now, he used to do steel tying for us and now he's working for a D.B.E. at our suggestion. And we are paying the D.B.E. some thirteen thousand dollars more than we would have to the man that used to work for us who's not a D.B.E.

Q And —

A And we are worried about that. Because there is a federal law, Judge, you are familiar with, I am sure.

THE COURT: Yes, I have had a little dealing with this. Go ahead.

A And that worries us from the punitive standpoint of the five hundred thousand dollars fine or five years in jail.

It is a — you have always got to have that in the back of your mind on what you are doing with D.B.E.'s. We don't know.

We are in gray areas in some places. Some places, maybe not.

Q Does the State of Florida require that you as a corporation provide any technical assistance to D.B.E.'s?

A Well, it is in the federal regulations, too, that they would like for you to. It is one of the burdens. We have to do it.

A lot of times when a D.B.E. comes in, we have to let him have some of our equipment. Because invariably, he doesn't have enough equipment to properly do the job.

Q Do you have the regulation up there in front of you, the Department of Transportation regulation?

A No. But you were asking me a question about this right here. What the letter amounted to, is we let Bert Brooks know that his quote of a hundred ninety-nine thousand something on a job was the low bid for grassing work.

And unfortunately, we could not use it because we had to use a quote that was twenty thousand dollars higher on this particular job.

THE COURT: How much higher?

THE WITNESS: Twenty thousand dollars.

Right now, in further answer to your question about burden, like Mr. Brooks said, we generally don't even consider a non minority bid on grassing.

Q Based on you experience, is that true throughout the highway construction industry?

A Yes.

Q All right. Do you know of any white male non handicapped people who are — who own any certified D.B.E.'s?

A No. None that quote us or that we have met.

MR. SCHLANGER: I have no further questions at this time. Thank you.

-CROSS EXAMINATION-

BY MR. CHILES:

Q Mr. Cone, I believe when you first started talking about all the extra records you had to keep, you indicated that you had a clerk or somebody who did nothing but that?

A That is correct.

Q And her salary or wage, hers or his, a quantifiable amount of money?

A You mean how much do we pay her?

Q Correct?

A Well, I don't exactly know right now, but yes, its quantifiable from our records.

Q I see.

A It is not just —

Q Is it your testimony that absent the D.B.E. program, you wouldn't need that individual to work for you?

A Probably not.

Q So in fact. That is a quantifiable sum of money which you can come back and seek as damages, is it not, sir?

If you can make your case, that in fact, you wouldn't need that person but for the D.B.E. program?

A I don't know what the law is on damages, Mr. Chiles.

Q I understand that, sir. But could you?

A I could tell you how much she was making yes.

Q Okay.

Q Would you say that the recordkeeping is somewhat cumbersome?

A Absolutely. Very.

Q You were talking about bonding and the problem you have with trying to get bonded minorities.

Have you ever, in all your years of experience, had a problem getting a non minority subcontractor bonded?

A Oh, yes. I have said so, I think, originally.

Q So, in fact, the person's race or ethnicticity has nothing to do with that problem. Does it, sir?

A Not all together. No, sir. No.

Q You also indicated you have had a lot of problems with too many minorities taking on too much work and not timely completing your work?

A That is right.

Q Have you ever had that problem in a nonminority subcontractor in all your experience and years of experience?

A Oh, yes. But not as much.

Q But you have had problems?

A Oh, yes.

Q I believe you indicated that in part of your testimony, that one particular occasion, which maybe pending now or may have happened in the past, I didn't quite catch that; but you didn't make the stated goal in your contract of D.B.E. usage, and the State has held up payment of some sixteen thousand dollars?

A Did you ask the question, did I?

Q Do you recall that testimony?

A Yes. But you —

Q Is that what you said?

A I don't know. Would you repeat the question? You said did or didn't. I didn't understand which one you said.

Q I am trying to find out what you are testimony was?

A Would you repeat the question?

Q Well, what was your testimony on that point? That is my question.

A I said that we did not meet the goal. That we had to go in to keep from getting thrown off the bidders list and liquidated damages and do the work ourself, because the M.B.E. couldn't or wouldn't come in on time to do the job.

Q In fact, when you submitted those goals with the bid to the D.O.T. that was a contract, wasn't it, sir?

A It was a binding proposal. It was not the contract.

Q But you were bound to comply with what you stated you would do, weren't you, sir?

A Not necessarily.

In fact, sometimes they would waive one minority for the institution of another.

Q Did you seek to do that in this case?

A I really don't recall.

Q But you could have sought to do that, couldn't you, sir?

A Well, it is a little late when your at the end of the job, Mr. Chiles, and you don't — will be off the bidders list.

Q I understand you weren't going to get the timely completion by the person you indicated was going to do the work, you could have substituted another D.B.E., couldn't you?

A We could have, if we had known this one, wasn't going to come in and do it in a timely manner.

Q Are you aware of in that situation whether the State withheld payments because the Feds withheld payments to the State based on failure to comply?

A I do not know what the State's position was.

Q With regard to plaintiff's exhibit 13, the letter that you have in front of you, from your son, I believe?

A Yes.

Q To Mr. Brooks. Could you just read that entire letter?

A "Dear Bert: I wanted to write you and let you know your quote of three hundred ninety-nine thousand three hundred ninety-four and forty-four was the low bid for grassing work on the above project. Unfortunately —

COURT REPORTER: Slower, please!

A "Unfortunately, due to the stringent D.B.E.-W.B.E. requirements, we were unable to use your price."

Paragraph. "I had to use someone else's quote which was some twenty thousand dollars higher than yours.

"I guess you can chalk up another one for the federal government. It is a shame that the taxpayers are going to get cheated out of another twenty thousand dollars.

"Once again, I appreciate your quoting this this and I hope one of the these days we can do some business. Signed —

Q So in fact, that letter your son has indicated that it is the federal government that you have got the issue with. Is it not?

A Isn't that what the letter says?

A That is what the letter says.

Q Thank you.

Q You were present when I asked Mr. Brooks if there was not an ability to qualify in the specialty area of grassing? Did you not?

A Yes.

Q Did you hear what his response was?

A Best I recall, he said, no, he could not qualify.

Q I believe his answer was, No, there was no such qualification in the area."

Now, is that your testimony as well?

A No. It's one of the four hundred or five hundred or really unknowns in the Road Department on what you can qualify for.

There is no list in the Road Department of — no complete list of everything that requires you to qualify for.

Q But in fact you, yourself —

A I have asked for, several times.

Q You, yourself, have gotten an incidental class of work including fencing, grassing, seeding, sodding, landscaping, et cetera, et cetera. Is that correct?

A That is correct.

Q Now. In another part of your testimony, you indicated that in addition to the twenty thousand dollars referred to in the letter, there was an instance where you had to pay thirteen thousand more for a D.B.E. than you would have for the low bidder?

A Correct.

Q Isn't it true though you include that price within your bid and that price is passed on through to the Department of Transportation?

A No. In this particular case, we did not past it through.

We used the person that usually did it for us and that is what went into the bid. But we found out to make the D.B.E. requirement at a later date, we had to put that in, because there was a change in the amount on the job.

Q Okay. But in fact, had you done it in the normal course of events and had you had to use a D.B.E. which required you to bid more, you would have passed that had on through to the Department of Transportation, wouldn't you, sir?

A No —

Q And in fact, you wouldn't have been economically damaged at all would you?

THE COURT: Wait. Wait. Mr. Chiles, Don't interrupt him when he's answering. We can't hear anything if both of you talk at the same time.

Have you finished your answer?

THE WITNESS: I —

THE COURT: Regroup. Go ahead and you start with anything you didn't finish up, after he gets done asking this question. Go ahead.

Q My question to you was, had you done this in the normal course of events, had you submitted your bid using a D.B.E. subcontracting bid to you, which was higher than the low bid of some thirteen thousand dollars, that would have been passed on through the Department of Transportation, would it not? And you would have suffered no economic damages at all, would you?

A No. Not necessarily. A lot of times, what we have tried to do, and many times been unsuccessful, is talk the M.B.E. into meeting a lower non M.B.E. price.

So sometimes we take a chance on our own, which we frequently do in the road construction business.

Q But that is in order for you to try the secure the lowest overall bid altogether and get the award of contract yourself?

A That is correct. Because if somebody else doesn't use that particular M.B.E. or uses another one or uses a non M.B.E., then we won't be successful.

Q I believe one of the final portions of your testimony, you indicated, that you don't even generally consider nonminority bids on grassing and specialties of that area, is that correct?

A Grassing an curb and specialties in that area.

We try to put the M.B.E.'S in that those categories. Sometimes it is not enough so we have got to go to things like steel tying and that is the gray area we are worrying about.

Q But, in fact, however you determine to use D.B.E.'S to make the goal under the contract, it is your decision, not the Department of Transportation's?

A The Department of Transportation requires it or your bid is nonresponsive.

Q But they don't tell you where to place the subcontracting bids, where to place the D.B.E.'s at all, do they?

A Like I testified before, Mr. Chiles, that they don't have the equipment like on a bridge job, they don't do drive piling, there is nobody I know of that is even listed or certified as a pile driver. There is nobody certified to do bridge deck concrete.

And we do use D.B.E.'s on the hand rail. But then a lot of times on a big bridge job, that is not enough to make up these ten and twelve percent quotas.

Q But in any event?

A And we frequently have the ten and twelves. I haven't seen any zeros to the best of my knowledge.

Q But in any event, it is your decision and not the Department of Transportation as to how you subdivide that work, is it not?

A That is correct.

Q Mr. Cone, do you continue to this day to get state work?

A Let's see when the last job we had. The State has thrown out three jobs because it was over the estimate that we recently were low on.

No. To this date I don't continue to.

It depends on how long a period of time you are talking about.

Q Do you recall having been awarded a contract on the 15th of January 1988 by the State?

A Which county was it, I don't know.

Q Well, I can tell you the contract number and state job number?

A That doesn't do me much good. I can't keep up with all those numbers.

Q Would you dispute the fact you got the contract with the State in the past few months?

THE COURT: How much was it? Maybe that will help.

MR. CHILES: Three hundred ninety-seven thousand dollars.

A Yes, in Volusia County. That was in January.

Q So you are, in fact, continuing to do business with the State, are you not?

A Uh-huh, I hope so.

Q And you are meeting the goals that are set for the contracts when you do get awarded for the contracts?

A One way or another.

Q Your nonstate business, would you be able to be supported absent any state business at all?

A No. We make it a practice not to do any private work.

Q Do you recall a job completed in 1986 for C H 2 M Hill. Four million six hundred seventy-one thousand dollars?

A Hillsborough County Aviation Authority, that is correct.

Q That is not the State, is it?

A It is a pseudo state agency. Yes.

Q It is not a D.O.T. contract?

A Not D.O.T. Might have had some F.D.O.T. money in it.

Q Do you recall having completed a project in 1986 for the City of Tarpon Springs?

A YES.

Q Two hundred ninety-six thousand dollars?

A UH-HUH. That is not private work though.

Q Well, it is not state work is it?

A No. But they are all small jobs.

Q Do you recall a project completed in 1986 for Mark Waller of Watson and Company. Two million a hundred twenty-one thousand dollars?

A Who?

Q Watson and Company?

A No. — Oh, not Watson and Company. Again, it is the Hillsborough County Aviation Authority.

Q Do you recall submitting a proposal to be prequalified, wherein you were asked to list all the projects you had completed in the last three years?

A From the Aviation Authority or who?

Q Any source?

A Well, I would imagine on some prequalification, some county or some thing, yes.

Q Mr. Cone, did you bring with you a document such as Mr. Brooks brought, indicating how much your overall business has been for the last few years?

A No, I didn't.

Q Do you know how much your overall business has been overall the last several years?

A It's been running anywhere from I think about eight to ten million dollars.

Q And how much of that is State business.

A No, I don't even recall. I wouldn't know by the year any way.

Q Let me ask you this. You have been under these D.B.E. requirements since probably 1981 or '82, haven't you?

A I recall '83 and '84. I don't know about '81 and '82.

Q We will take '83.

That is five years, is it not?

A Yes.

Q How is it now that in January and February of 1988, you are just now becoming irreparably harmed when you have been under these programs for five years?

A Well, we have been irreparably harmed for five years.

Q Don't you think you are a little late coming in here five years after the program went into effect?

A I don't think there was any chance of doing much until the Wygant decision and Richmond Croson decision. The law leaned the other way.

Q Is that your legal opinion?

A No it is my lay opinion on reading the cases, Mr. Chiles.

Q Okay.

Q Have you ever submitted a bid to the State of Florida that didn't meet the goals set for that particular contract?

A Yes.

Q Did you then try to justify your failure to meet that goal with a good faith justification?

A No. Because I have been advised it doesn't do any good to try to meet the good faith, and in fact, its almost impossible under the guidelines.

Q You have been advised but you have never tried it yourself, is that correct?

A I have tried it recently on a City of Tampa job which would be very interesting to see how it goes.

Q Have you ever tried it with the Department of Transportation?

A Not in submitting, that we tried to meet the good faith efforts, no. I just didn't meet the requirements.

Q So in fact, you had no personal knowledge of whether or not you could get an exception based upon good faith justifications, do you?

A Not from personal knowledge, but I have knowledge from Mr. Barco who tried it, and even though it was illegal, at the time, under the W.B.E. because the State hasn't passed it, he still lost in front of a hearing officer.

Q It went to the First District Court of Appeal and they upheld the Department of Transportation, saying, No, he hadn't bothered to make the good faith effort? Isn't that the way that ended?

A I don't know. All I know it was kicked out. It wasn't even in the law.

Q That is right because he didn't bother to submit a good faith?

A He didn't bother to sue under that.

His lawyer didn't catch that, I think, Mr. Chiles.

Q In any event, you have no personal knowledge of whether or not good faith exception was going to be used or not?

A Personally, I haven't tried it.

Q When you accept -- when you make a bid on a contract for the State of Florida, you generally have it divided into specific areas of work, do you not, in order for you to make specific estimates of how much you are going to bid overall?

A We just use the State's own items — item numbers.

Q For anything you are going to subcontract out, then you send out bids, just pretty much the same way the State does, do you not?

A We generally don't subcontract.

Q Okay. Do you, on occasion, subcontract?

A I think once.

Q In fact. When you need to meet your D.B.E. goals, you do, don't you?

A You mean we get other subcontractors to quote us as a prime or vise versa?

Q To come to you with specialty parts contract of the project in your overall prime contract to bid?

A Yes, we send out letters.

Q When those bids come back, they come back with exact dollar amounts on them, do they not?

A No, not necessarily. We get all different kind of things. Sometimes we get lump sums and they tell us to divide it out, which is impossible, or sometimes it doesn't add up right.

So no. It is not — some of them are done improperly. We always check the addition.

Q When you make an award to a subcontractor, you have exact dollar figures in front of you which you are going to use to make that award, do you not?

A Yes.

Q Okay.

So the person who's awarded the subcontract, assuming that it is a D.B.E., and you are using that to fulfill your goal, you would know with exactitude how much the difference is between his bid and the overall real low bid, would you not?

A In some cases, we don't even consider, as I have testified before, a non M.B.E. price, so no, we don't even worry about it.

Q But in any event, when they submit bids to you they submit them to you in dollar figures, do they not?

A Oh, yes, some.

Q So you could go back after the fact and determine what the difference in your prices were for having to accept D.B.E., or if you didn't have to accept the D.B.E., isn't that correct?

A Yes, if we kept them or worried about that.

Q In other words, you could come in and indicate exactly how much money you had lost or profit you had lost based upon the D.B.E. program, could you not?

A No. I don't think so. Because we wouldn't know what jobs we lost because we got a high price from a D.B.E.

Q So, in fact, you don't know if it is the D.B.E. program at all causing you harm. You don't know whether it was because you weren't the low bid bidder or whether you had to use the D.B.E. and you were thus the high bidder? You simply don't know, do you?

A I do know it costs us money when we go out and have do replace ten percent of the curb. The Road Department gets unpleasant with us because we have to do things like that.

So yes, its — there is other things beside just the bid they give you.

Q And, in fact, it is other things besides the D.B.E. program itself?

A There is always a risk in the contracting business, but it is one of the things that does create a tremendous burden.

MR. CHILES: One of the things. Thank you. I have nothing further.

THE COURT: Any questions?

MR. SCHLANGER: Your Honor.

THE COURT: Mr. Cone. Let me ask you — And I am not sure that I, with all the questions I have been asking you, when these costs that are incurred as a result of your trying to comply, do you not pass — isn't that included in your bid price?

THE WITNESS: Some of it is, your Honor. They increase overhead from the girls in the office.

THE COURT: Yes.

THE WITNESS: But what happens is, when we get out in bidding work, which does overshadow that costs of extra girls and filling out all the forms and everything.

THE COURT: Extra people?

THE WITNESS: Extra people — excuse me, I am sorry — persons.

And whee it costs us, is when we bid the job, we have, a lot of times, we will figure it ourselves even, and sometimes we make mistakes.

Like this particular case about the steel, because we have used this man for two or three years before, and —

THE COURT: You are estimating what the bid should come back to?

THE WITNESS: What it should come in at. Rather than hoping we can get them down to that or some cases, some of them have been lower than that. But preponderately it is more.

THE COURT: I guess what I am trying —

THE WITNESS: No sir. It is not reflected in our bid price. A lot of it isn't. We put as much as we possible can in there that we know about.

THE COURT: I guess the point I am driving at, with all of you here, is that if in attempting to comply with some imposed quotas or some idea that the disadvantaged should be able to participate in State contracts, this has a — if, in attempting to do that, the overall cost from the taxpayer is increased, then my — I am thinking this thing through —

that there has been, then, a political decision that this is what the public is, should be or is willing to accept to accomplish some other perceived socially acceptable goal.

And part and parcel of that, I am asking that as a businessman who is in business to make a profit so that you can keep people on the payroll and keep them gainfully employed, is this just not another cost of doing business?

THE WITNESS: Yes sir. It is. It is an enforced cost of doing business.

THE COURT: I understand that. As much as hiring an accountant to keep you out of trouble with the tax people?

THE WITNESS: Yes. And lawyers.

THE COURT: And lawyers. Oh, yes. God forbid. All right.

* * * *

THE COURT: Has the Attorney General been served here? The Attorney General of Florida?

MR. CHILES: The Attorney General of the State of Florida has, but I am talking about federal government. If they are intending to attack the federal statute, then they have the wrong parties.

MR. SCHLANGER: No, sir.

THE COURT: You aren't about to get in to that briarpatch, are you?

MR. SCHLANGER: No, sir. We are not.

THE COURT: Okay.

* * * *

United States District Court

NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

THE CONE CORPORATION, et al., : *Plaintiffs,* vs. FLORIDA DEPARTMENT OF TRANSPORTATION, et al., *Defendants.*	CASE NO. TCA 88-40042-WS

DEPOSITION OF:	DOUGLAS P. CONE
TAKEN:	Pursuant to Notice by Counsel for Defendants.
DATE:	August 16, 1988
TIME:	8:30 a.m.
LOCATION:	5201 Cone Road Tampa, Florida 33680
REPORTED BY:	Lynne D. Betten

* * * * * * * *

* * * *

Q How many of your contracts over the past year that you have bid on and have not been successful on were due to the fact that you have to use minorities?

A There is no way I would know that, Harry.

Q Have you submitted bids to the state when you didn't meet the minority goal that was set aside for that particular contract?

A Yes.

Q Have you ever been successful when you have done that?

A By "successful," how do you mean?

Q Did you get the contract?

A No. One in particular I am thinking about, they awarded it to the second bidder.

Q You were the low bidder?

A Yes.

Q Who would have gotten that, and what project was that?

A It was Holmes County, but I don't remember the job number, or anything like that. It was some time ago.

* * * *

Q With regard to the instance you told me about in Holmes County, the Holmes County project where you were the low bidder but you didn't get the job because you didn't meet the DBE goal, did you attempt to make a good faith justification as to why you didn't meet the goal in that situation?

A We didn't, according to the guidelines of FDOT, because up to now they have not — as far as my knowledge goes, they have only awarded one job based on good faith efforts. And that was some time ago. The rest of the time, if there is another bidder on the project and he supposedly meets the goal, then they assume — good faith efforts don't work.

Q Did you submit any kind of justification?

A No.

Q Are you aware whether the second low bidder did meet the DBE goal?

A Apparently he must have.

* * * *

In The United States District Court
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

THE CONE CORPORATION, et al.,
Plaintiffs,

v. TCA 88-40042-WS

FLORIDA DEPARTMENT OF TRANSPORTATION; and KAYE HENDERSON, Secretary of the Department of Transportation;
Defendants

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AGAINST RACIAL DISCRIMINATION

THE CONE CORPORATION, C.H. BARCO CONTRACTING COMPANY, INC., ASPHALT PAVERS, INC., HEWITT CONTRACTING CO., INC., J.W. CONNER 7 SONS, INC., CONE CONSTRUCTORS, INC., LEWARE CONSTRUCTION CO., CAPELETTI BROTHERS, INC., and O.B. BROOKS 7 SONS GRASSING, INC., for their complaint against the FLORIDA DEPARTMENT OF TRANSPORTATION and KAYE HENDERSON allege as follows:

I.
JURISDICTION AND VENUE

* * * *

II.
PARTIES

* * * *

III.
DEFINITIONS

* * * *

III.
UNITED STATES CONSTITUTIONAL PROVISIONS, UNITED STATES STATUTES, REGULATIONS, AND EXECUTIVE ORDERS INVOLVED

* * * *

IV.
STATE STATUTE INVOLVED

* * * *

V.
SUBSTANTIVE ALLEGATIONS

* * * *

VI.
EFFECT ON THE PLAINTIFFS; IRREPARABLE HARM

66. Each of the plaintiffs has in the past, currently does and will in the future seek to perform work in the highway construction industry in Florida.

67. Each of the plaintiffs has been injured in its business or property as the result of the racial discrimination currently being practiced by the State of Florida in the award of highway construction contracts.

68. Non-MBE specialty subcontractors, including the plaintiff subcontractors, bear a disproportionate share of the burden imposed by Florida's MBE set-aside program in the highway construction industry.

69. Non-MBE prime contractors, including the plaintiff prime contractors, bear a disproportionate share of the burden imposed by Florida's MBE set-aside program in the highway construction industry.

70. Unless this Court enjoins the unlawful and unconstitutional conduct of the State of Florida, each of the plaintiffs will, in the future, be injured in its business or property in ways which are difficult or impossible to quantify in money and which are difficult or impossible to remedy.

71. The Florida DOT has, through its attorneys, indicated that it will continue to use racial and ethnic criteria in determining whether bids received by it are responsive even if enforcement of FSA 339.0805 and FDOT Rule Chapter 14-78 are enjoined as being unconstitutional.

72. Plaintiffs have no adequate remedy at law to prevent future unconstitutional racial discrimination by the State of Florida in the awarding of highway construction contracts.

VII.
RELIEF REQUESTED

WHEREFORE, plaintiffs pray that this Court enter judgment in favor of the plaintiffs and:

1. enter an order:

   a. declaring that the plaintiffs are entitled to submit bids to the State of Florida for highway construction work and to have those bids

considered without regard to the racial or ethnic character or membership of the bidder or of the bidder's subcontractors; and

b. declaring unconstitutional and unenforceable:

(1) FSA § 339.0805 and FDOT Rule Chapter 14-78; and
(2) the practice, policy, custom, and usage of the State of Florida which encourages or requires consideration of racial and ethnic criteria for determining whether bids submitted for highway construction work are responsive;

2. enjoin the defendants from using racial or ethnic criteria in deciding:

a. whether a bid submitted for highway construction work is responsive,

b. whether such a bid will be consdiered and

c. whether a contract will be awarded to a contractor submitting such a bid;

3. award the plaintiffs their costs of this action, including a reasonable attorney's fee; and

4. grant the plaintiffs such other and further relief as the Court deems appropriate under the circumstances.

_____/s/_____
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